IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**CRIMINAL NO.: 04-CR-00364**
	:	
DENIS SHUSTERMAN	:	

SENTENCING MEMORANDUM
ON BEHALF OF DENIS SHUSTERMAN

Denis Shusterman, by and through his attorney, Ari R. Karpf, respectfully submits this Sentencing Memorandum to assist the Court in determining a sentence that is "sufficient, but not greater than necessary," to comply with the statutory directives set forth in 18 U.S.C. § 3553(a). Specifically, Mr. Shusterman respectfully requests this court to impose a sentence that is not longer than necessary to achieve the court's aim of deterrence.

I. INTRODUCTION

From the beginning of this case and through its prologue Mr. Shusterman has been subjected to extensive scrutiny through negative media publicity. There have been persistent references about his mother, Betty Shusterman, and her criminal matter which is wholly unrelated to the instant case. Betty Shusterman was highlighted at Mr. Shusterman's trial in an apparent attempt to establish guilt by association. Additionally, the government's pre-sentencing memorandum includes a rather lengthy and inappropriate footnote at paragraph 155, which summarizes Betty Shusterman's own criminal proceedings. These stray mentions have created a misleading public perception of Mr. Shusterman. Mr. Shusterman respectfully requests that his mother's criminal history not sway or influence the sentence this Court intends to impose upon him. Mr. Shusterman also sets forth concerns about harsher guidelines being retroactively

applied to him, as set forth in detail herein.

II. SENTENCING GUIDELINES

The federal criminal sentencing guidelines following the decision in United States v. Booker, 125 S. Ct. 738 (2005) have reinforced the usage of the guidelines by courts no longer mandatory but advisory. A sentencing court can impose a sentence within the guideline structure or outside of the applicable guidance of the guidelines. United States v. Crosby, __ F.3d __, 2005 WL 240916 (2d Cir. February 2, 2005). The guidelines now require the court to consider a defendant's guideline range, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), however, the court may alter a sentence as appropriate with the application of other statutory consideration.

On January 12, 2005, the Supreme Court ruled that its Sixth Amendment holding in Blakely v. Washington, 124 S. Ct. 2531 (2004) and Apprendi v. New Jersey, 530 U.S. 466 (2000) applies to the Federal Sentencing Guidelines. United States v. Booker, 125 S. Ct. 738, 756 (2005). Given the mandatory nature of the Sentencing Guidelines, the Court found "no relevant distinction between the sentence imposed pursuant to the Washington statutes in Blakely and the sentences imposed pursuant to the Federal Sentencing Guidelines" in the cases before the Court. Id. at 751. Accordingly, reaffirming its holding in Apprendi, the Court concluded that

> [a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plead of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

Id. at 756.

The Court further found those provisions of the federal Sentencing Reform Act of 1984 that make the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) or which rely upon the Guideline's

mandatory nature, 18 U.S.C. § 3742(e), incompatible with its Sixth Amendment holding. Booker, 125 S. Ct. At 756. Accordingly, the Court severed and excised those provisions, "mak[ing] the Guidelines effectively advisory." Id. at 757.

Instead of being bound by the Sentencing Guidelines, the Sentencing Reform Act, as revised by Booker,

> requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553 (a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a).

Booker, 125 S. Ct. at 757. Thus, under Booker, sentencing courts must treat the guidelines as just one of a number of sentencing factors set forth in 18 U.S.C. § 3553(a).

Section 3553(a)(2) states that such purposes are:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

In determining the minimal sufficient sentence, § 3553(a) further directs sentencing courts to consider the following factors:

1. "the nature and circumstances of the offense and the history and characteristics of the defendant" (§ 3553(a)(1));
2. "the kinds of sentences available" (§ 3553(a)(3));
3. "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" (§ 3553(a)(6)); and
4. "the need to provide restitution to any victims of the offense." (§ 3553(a)(7)).

Under 18 U.S.C. § 3582, imposition of a term of imprisonment is subject to the following limitation: in determining whether and to what extent imprisonment is appropriate based on the Section 3553(a) factors, the judge is required to "recogniz[e] that imprisonment is *not* an appropriate means of promoting correction and rehabilitation" (emphasis added).

Under 18 U.S.C. § 3661, "*no limitation* shall be placed on the information concerning the background, character, and conduct of [Mr. Shusterman] which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." This statutory language certainly overrides the (now-advisory) policy statements in Part H of the sentencing guidelines, which list as "not ordinarily relevant" to sentencing a variety of factors such as the defendant's age, educational and vocational skills, mental and emotional conditions, drug and alcohol dependence, and lack of guidance as a youth. *See* U.S.S.G. § 5H1. See also United States v. Nellum, 2005 WL 300073, 2005 U.S. Dist. LEXIS 1568 (N.D. Ind. Feb. 3, 2005) (taking into account fact that defendant, who was 57 at sentencing, would upon his release from prison have a very low likelihood of recidivism since recidivism reduces with age; citing Report of the U.S. Sentencing Commission, Measuring Recidivism: the Criminal History Computation of the Federal Sentencing Guidelines, May 2004).

The directives of Booker and § 3553(a) make clear that courts may no longer uncritically apply the guidelines. Such an approach would be "inconsistent with the holding of the merits majority in Booker, rejecting mandatory guideline sentences based on judicial fact-finding, and the remedial majority in Booker, directing courts to consider all of the § 3353(a) factors, may of which the guidelines either reject or ignore." United States v. Ranum, 353 F. Supp. 2d 984, 985-86 (E.D. Wisc. Jan. 19, 2005). As another district court judge has correctly observed, any

approach which automatically gives "heavy" weight to the guideline range "comes perilously close to the mandatory regime found to be constitutionally inform in Booker." United States v. Jaber, __ F. Supp. 2d __, 2005 WL 605787 *4 (D. Mass. March 16, 2005). See also United States v. Ameline, 400 F.3d 646, 655-56 (9th Cir. Feb. 9, 2005) (advisory guideline range is "only one of many factors that a sentence judge must consider in determining an appropriate individualized sentence"), reh'g *en banc* granted, 401 F.3d 1007 (9th Cir. 2005).

Justice Scalia explains the point well in his dissent from Booker's remedial holding:

> Thus, logic compels the conclusion that the sentencing judge, after considering the recited factors (including the guidelines), has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range. If the majority thought otherwise- if it thought the Guidelines not only had to be 'considered' (as the amputated statute requires) but had generally to be followed- its opinion would surely say so.

Booker, 125 S. Ct. at 791 (Scalia, J., dissenting in part).

Likewise, if the remedial majority thought the guidelines had to be given "heavy weight," its opinion would have said so. The remedial majority clearly understood that giving any special weight to the guideline range relative to the other Section 3553(a) factors would violate the Sixth Amendment.

Now, the sentencing court is required to not just apply the guidelines and order a sentence, the sentence must be "sufficient but not greater than necessary to meet the goals of sentencing," and take into consideration the factors under § 3553(a).

II. FACTUAL OVERVIEW

In the present case, the following factors should be considered when determining what

type and length of sentence is sufficient, but not greater than necessary, to satisfy the purposes of sentencing.

On December 9, 2004, Mr. Shusterman, who is a 46-year old individual, was charged with multiple violations of federal law spanning the years 1997-2003, including but not limited to, bankruptcy fraud, tax evasion, wire fraud, and perjury (by grand jury indictment). Mr. Shusterman's criminal trial extended from April 17, 2006 through May 3, 2006. Instead of continuing the trial, Mr. Shusterman unexpectedly pleaded guilty to Counts 1-51 on May 3, 2006 after his expert witness testified.

III. SENTENCING OPTIONS

Consideration of the pre-November 2001 manual in this instant sentencing proceeding is more appropriate because it would provide for a more fair and proper sentence since the majority of Mr. Shusterman's criminal activity is believed to have taken place from 1997 through the better part of 2001. In this instance, the court should apply the version in effect at the time the crime or crimes were committed. United States v. Kopp, 951 F.2d 521, 526 (3d Cir. 1991)(citing Miller v. Florida, 482 U.S. 423 (1987). Accordingly, under the pre-November advisory guidelines, Mr. Shusterman's sentence range is 97-121, months as indicated in the government's sentencing memorandum.

Specifically, the post-amendment guidelines provide for a much more harsh sentence then the earlier version of the guidelines. Post-amendment guidelines provide for a two-level increase if the offense involved a "violation of any judicial or administrative order, injunction, decree or process." U.S.S.G. § 2F1.1(b)(4)(B)(1998). Some circuit courts interpreted "judicial process" to include a bankruptcy proceeding, but the Third Circuit did not. United States v. Thayer, 201

F.3d at 226-28. In United States v. Thayer, this Court defined "judicial process" as a "command or order to a specific party, such as a summon". Id. at 228 (quoting United States v. Carrozzella, 105 F.3d 796-800 (2d Cir. 1997). Ultimately, this Court held that an enhancement under § 2F1.1(b)(4)(B) was not warranted merely by the fact the defendant committed bankruptcy fraud. Id.

In considering this, the Court can also consider the punishment Mr. Shusterman has already endured, and will continue to endure. In Redemann, the court granted a downward departure based on the fact that the defendant had already paid a high civil penalty, had been exposed to "a great deal of adverse publicity in his small town," all of which had injured his children, ruined his business and contributed to the ill health of defendant's family. "In sum, defendant lost a lot based on his misconduct before he ever set foot in this court." 205 F. Supp. 2d 887, 896-897. This situation parallels Mr. Shusterman's own circumstances. Not only has his family suffered greatly due to the resentment cast upon them from their community, but Mr. Shusterman's financial security is also depleted. Not only will Mr. Shusterman's children not be properly provided for if he is incarcerated for a lengthy sentence, but his parents and siblings will suffer in the form of care due to a protracted sentence.

There is no need to protect the public from further crimes by Mr. Shusterman. The very public nature of his prosecution through the media, his decline and ultimate fall from the professional view, combined with his criminal prosecution has been sever punishment thus far. (18 U.S.C. § 3553(a)(2)(b)). As stated above, this Court should impose a sentence that reflects the seriousness of the offense, that promotes respect for the law, and provides a just punishment for the offense (18 U.S.C. § 3553(a)(2)(a)). It should also consider the correctional treatment

needed (18 U.S.C. § 3553(a)(2)(d)). All those ends can be fulfilled without further destroying Mr. Shusterman, his family and any hope he has of reconstructing a productive and contributing life.

Mr. Shusterman is contrite, no longer in a position to re-offend, and is not a risk for recidivism. He has lost his employment and been stripped of his professional status as an accountant. In fact, at the time of sentencing, nearly 4 years have passed since these offenses have ended, proving that no need for rehabilitation is needed. Because of Mr. Shusterman's presumed participation in these offenses, he has lost his community, his reputation, his livelihood, his financial independence and security, and a future with his children and loved ones. "[I]f the nature of the offense and the character of the defendant tend to show that no end other than punishment will be served by imprisonment, if there is no threat to the community, and if society will ultimately benefit by allowing the defendant to care for his or her family, a departure is warranted." United States v. Norton, 218 F.Supp. 2d 1014, 1020 (E.D. Wis. 2003), citing, United States v. Gaskill, 991 F.2d 82, 84-5 (3d Cir. 1993).

Additionally, the fact that nearly every crime is thought to have been committed prior to the November 2001 amendment warrants the pre-amendment guidelines being taken into consideration. Therefore, if this Court is inclined to rely on the sentencing guidelines, an appropriate sentence range for Mr. Shusterman would be 97-121 months.

CONCLUSION

For the foregoing reasons, Mr. Shusterman respectfully requests that he be sentenced towards the lower end of a range of 97-121 months. This sentence will reflect the seriousness of the offenses, promote respect for the law, and accomplish more than a sufficient level of

deterrence. Further, this sentence range will adequately protect the public from further crimes as, Mr. Shusterman does not present any risk of recidivism.

Respectfully submitted

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